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Nos. 84-871, 84-889, 84-1054, and 84-1069

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Louisiana Public Service Commission,

Appellant

v.

Federal Communications Commission and
United States of America

Appellees

California and Public Utilities Commission of California, *et al.*,

Petitioners

v.

Federal Communications Commission and
United States of America

Respondents

Public Utilities Commission of Ohio, *et al.*,

Petitioners

v.

Federal Communications Commission and
United States of America

Respondents

Florida Public Service Commission,

Petitioner

v.

Federal Communications Commission and
United States of America

Respondents

On Appeal And On Petitions For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

JOINT BRIEF OF THE STATE OF ALABAMA AND THE ALABAMA PUBLIC SERVICE COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANT AND PETITIONERS URGING REVERSAL

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JOINT BRIEF OF THE STATE OF ALABAMA AND THE ALABAMA PUBLIC SERVICE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANT AND PETITIONERS URGING REVERSAL

The State of Alabama and the Alabama Public Service Commission, submit their joint brief as *amici curiae* in support of Appellant, the Louisiana Public Service Com-

mission and Petitioners the People of California and the Public Utilities Commission of California, *et al.*, and the Public Utilities Commission of Ohio, *et al.*, and the Florida Public Service Commission. The *amici curiae* submit that the decision of the United States Court of Appeals for the Fourth Circuit in *Virginia State Corporation Commission v. F.C.C.*, 737 F.2d 388 (4th Cir. 1984) should be reversed.

Pursuant to Rule 36.4 of the Rules of this Court, this brief is filed by the State of Alabama by and through its Attorney General.

INTEREST OF *AMICI*

The Attorney General of the State of Alabama appears herein on behalf of the citizens of the State of Alabama who are affected by the Order under consideration. The Alabama Public Service Commission is the body charged with the statutory duty to regulate intrastate rates and charges for telecommunication services. The *amici* submit that the Federal Communications Commission's Order interferes with their duty to ensure that rates are reasonable and just to both the utility and the public.

SUMMARY OF ARGUMENT

The State of Alabama and the Alabama Public Service Commission as *amici curiae* submit that the Fourth Circuit Court of Appeals improperly relied upon Section 151 of the Communications Act in determining the scope of the Federal Communications Commission's authority under the Act. The clear intent of Congress as evidenced by Sections 152(b) and 153(e) was to distinguish between interstate and intrastate ratemaking authority. In evaluating the jurisdiction of the Federal Communications Commission the courts should require a clear showing by the FCC that concurrent regulation is not possible and that continued

joint regulation by State and Federal agencies will have a substantial adverse effect on interstate communications. The FCC does not have general intrastate ratemaking authority and has attempted to assume that authority without making findings of fact in their order which would justify this incursion into an area which has always been subject to concurrent regulation without any substantial adverse effect on interstate communications.

ARGUMENT

I. THE PURPOSE CLAUSE OF THE COMMUNICATIONS ACT DOES NOT SUPERCEDE THE JURISDICTIONAL LIMITATIONS PLACED UPON THE FEDERAL COMMUNICATIONS COMMISSION.

The decision by the Fourth Circuit in the *Virginia*[1] case relies upon the purposes outlined by Congress for the FCC in the Communications Act[2], without considering the jurisdictional limitations contained in the Act. This reliance on Section 151 is misplaced, and constitutes reversible error.

The Communications Act sets forth the following statement of purpose for the Commission:

> . . . To make available, so far as possible, . . . a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges . . .[3].

This statutory mandate provides the Federal Communica-

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[1] *Virginia State Corp. Comn. v. Federal Communications Commission*, 737 F.2d 388 (4th Cir. 1984).

[2] 47 U.S.C. §151 *et. seq.*

[3] 47 U.S.C. §151.

tions Commission (hereinafter "FCC") with an explicit objective, and presumably all of their activities are guided by this statement of purpose.

This statement of purpose, however, is not a statement of jurisdiction, and, in fact, Section 151 contains express limitations on the authority of the FCC. It may act only "so far as possible"[4] within the jurisdictional restrictions set forth in the Communications Act to carry out this objective. Despite these express limitations, the Fourth Circuit found it "unneccessary to decide whether as a matter of law, the language of the Act itself requires preemption."[5]

In allowing preemption of all conflicting state regulations regarding depreciation, the Fourth Circuit relied upon the FCC's stated objective of encouraging competition, which apparently, the FCC believes will further its statutory mandate to provide a "rapid" and "efficient" communication network. It is clear, however, that the FCC's "goal" need not "in all cases take precedent, especially where the FCC's jurisdiction is explicitly denied under other provisions of the Act"[6].

In *Hines v. Davidowitz*[7] this Court stated that state law is preempted if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[8] This broad principle must be read, however, in light of this Court's later cases which suggest that promotion of federal objectives is not to be accomplished "at all costs."[9] Thus,

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[4]47 U.S.C. §151.

[5]*Virginia State Corp. Comn., supra* at 392.

[6]*National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601, 613 (D.C. Cir. 1976).

[7]*Hines v. Davidowitz*, 312 U.S. 52 (1941).

[8]*Id.* at 67.

[9]*Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 1731 (1983).

Federal policies or objectives must give way "where Congress has left sufficient authority with the State"[10] to act in a manner that would, in effect, "undercut a federal objective".[11]

In the case currently before this Honorable Court, the FCC's jurisdiction has been explicitly denied under Section 152(b) of the Communications Act. It is also apparent that the "Commission was not delegated unrestrained authority"[12] under the Act and that particular jurisdictional limitations may serve to constrain the FCC's activities in furtherance of its statutory objectives. Further, the FCC's jurisdiction, if limited only by the Congressional statement of purpose, is "unbounded".[13] The Fourth Circuit has ignored the specific limitations placed upon the FCC by virtue of the statutory grant of jurisdiction contained in Section 152(a) and the specific denial of jurisdiction contained in Section 152(b).

Obviously a balance must be struck between the objectives set forth in the Act, and the specific jurisdictional limitations contained in the Act. The prior decisions of the lower Courts, which will be examined in Section III of this brief, provide a basis for a realistic balance between the stated objectives and the statutory jurisdictional limitations by which the FCC is constrained in its authority to act.

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[10] *Id.* at 1732.

[11] *Id.* at 1732. See also, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981) in which this Court rejected the argument that a statement of basic national policy in a particular field will serve to preempt conflicting state laws.

[12] *Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689, 706, 99 S.Ct. 1435, 1444 (1979).

[13] *Id.* at 1444.

II. CONGRESS HAS RESERVED JURISDICTION TO THE STATES, THROUGH THE FEDERAL COMMUNICATIONS ACT, TO PRESCRIBE CLASSES OF PROPERTY AND PERCENTAGES TO BE ALLOWED AS DEPRECIATION FOR INTRASTATE COMMUNICATION SERVICES.

The FCC erroneously relies heavily on Section 220(b) to override the jurisdictional limitations Congress explicitly set out in Section 152(b).[14] Section 220 is not without distinctions between interstate and intrastate jurisdictions. The Act provides that the FCC may prescribe forms of accounts, records, and memoranda to "carriers subject to the Act".[15] Section 220(b) allows the FCC to, "provide for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose . . ."[16] While Sections 220(a) and (b) give the FCC authority to prescribe classes of property and percentages to be allowed as depreciation, the authority is limited by Section 152(b).

Even without the distinction built in to Section 220 itself, Section 152(b) states that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction"[17] over intrastate communications; therefore, Sections 220(a) and (b) cannot be construed so as to apply to intrastate communications when read in light of Section 152(b).

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[14] *Amendment of Part 31*, 92 F.C.C.2d 864, (1983) (hereinafter *"Preemption Order"*).

[15] 47 U.S.C. §220(a)

[16] 47 U.S.C. §220(b).

[17] 47 U.S.C. §152(b).

The FCC is granted jurisdiction over interstate communication in Section 152(a) and expressly prohibited from exercising jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio"[18] in Section 152(b)(1).

Congress has defined interstate communications and transmissions, for purposes of the Act, as communications and transmissions:

> from any State, Territory, or possession of the United States . . . to any other State, Territory, or possession of the United States . . . but shall not, with respect to provisions of title II of this Act include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.[19]

The Communications Act provides that "interstate communication" or "interstate transmission" means communication or transmission as defined in that section.[20] "A definition in a statute that declares what a term means, as opposed to what the definition includes, excludes any meaning that is not stated."[21] It is clear when reading Section 153(e) that Congress has not included, and has, in fact, expressly prohibited the FCC from exercising juris-

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[18]47 U.S.C. §152(b).

[19]47 U.S.C. §153(e).

[20]47 U.S.C. §153(e).

[21]*Colautti v. Franklin*, 439 U.S. 379 (1978), *Meltzer v. Zoller*, 520 F.Supp. 847 (D.N.J. 1981).

diction over intrastate activities and has limited their jurisdiction to communication or transmission from any state to any other state.

The FCC's interpretation of its statutory authority renders Sections 152(b) and 153(e) virtually meaningless by obliterating the distinction between the interstate and intrastate jurisdictions.

An attempt must be made, as the FCC failed to do, to construe "each part or section . . . in connection with every part or section so as to produce a harmonious whole. It is not proper to confine interpretation to the one section to be construed".[22] In construing Sections 220(a) and (b) in light of the limitation to carriers subject to the Act described in Section 152(a), there is harmony which allows all sections to be given effect. This construction shows a clear intent on the part of Congress to reserve to the states, authority over prescribing classes of property and percentages to be allowed as depreciation for intrastate communications.

III. THE COURT FAILED TO USE THE PROPER TEST IN EVALUATING THE JURISDICTION OF THE FCC.

The *amici* submit that the FCC should only have jurisdiction over the rates and service regulations of the intrastate portion of jointly used facilities or services upon a clear showing that concurrent regulation is not possible and upon a clear showing of a substantial adverse effect upon interstate communications services of particular intrastate charges, classifications or regulations.

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[22] *Juvenile Products Manufacturers Assoc., Inc. v. Edmisten*, 568 F.Supp. 714, (E.D.N.C. 1983); A. Sutherland, 2A *Statutes and Statutory Construction*, §46.05, 56 (4th Ed., Sands Ed. 1973).

The issue presented in this case is the extent of the authority of the FCC to prescribe depreciation accounting practices for the portion of costs allocated to the intrastate jurisdiction.[23] The court below made an abrupt departure in its review of the FCC from the method of review adopted in previous decisions.

In *North Carolina Utilities Commission v. F.C.C.* (hereinafter "*NCUC I*")[24], the Fourth Circuit ruled that the North Carolina Utilities Commission could not prohibit the interconnection of terminal equipment except for use exclusively with facilities separate from those used in intrastate communications. The Fourth Circuit found that "[u]sually it is not feasible, as a matter of economics and practicality of operation, to limit the use of such equipment to either interstate or intrastate transmissions."[25] The court noted that the FCC had initially determined that blanket prohibitions against interconnection are unjustifiably discriminatory.[26] In evaluating the conflicting positions of interstate and intrastate regulators, the court stated:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications.[27]

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[23]Part I *infra*. The investment costs associated with jointly used facilities are allocated under Part 67 as mandated in *Smith v. Illinois Bell Telephone Company*.

[24]*NCUC I*, 537 F.2d 787 (4th Cir. 1976).

[25]*NCUC I*, *supra* at 791.

[26]*Id.* at 792, citing *Carterfone v. AT&T*, 13 F.C.C.2d 420, *recon den.*, 14 F.C.C.2d 571 (1968).

[27]*NCUC I*, *supra* at 793.

The court determined that concurrent federal and state regulation was not feasible in that case, and that the ability to interconnect terminal equipment to the local exchange network has a substantial effect on interstate communications.

In *Computer and Communications Industry Association v. F.C.C.*[28] the D.C. Circuit reasoned that the FCC's jurisdiction is paramount whenever state regulation interferes with the achievement of a federal regulatory goal.[29] The court stated,[30] however, that its application of this broad mandate was in accord with the jurisdictional limitations adopted in *NCUC I*. The court apparently believed that concurrent federal and state regulation of customer premises equipment (hereinafter "CPE") and enhanced services was not possible[31] and that there would be a substantial adverse effect produced by continued state regulation.[32] The FCC wanted the charges for CPE to be separated from the flat monthly rates so customers choosing to purchase and interconnect their own equipment would not be forced to subsidize company provided CPE.[33] The FCC also chose to deregulate the sale and lease of new CPE in order to promote competition of that service. The court, however, emphasized that its sanction of the FCC's

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[28]693 F.2d 198 (D.C. Cir. 1982).

[29]*Id.* at 214.

[30]*Id.* at 215.

[31]*Id.* at 216 wherein the court stated: "...state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service . . ."

[32]*Id.* at 216, wherein the court stated: "the conflicting state policy meant to affect only intrastate use would unavoidably affect the federal policy adversely."

[33]*Second Computer Inquiry*, 77 F.C.C.2d 198 (hereinafter *"Computer II"*.

decision in *Computer II*, "is a very narrow one, given in light of the peculiar nature of the communications and data processing industries . . .".[34]

In the Preemption Order the FCC did not clearly state the substantial federal interest affected by depreciation charges.[35]

The court of appeals erred by failing to consider the jurisdictional limitations of the FCC[36] and failed to correct its error by attempting to rationalize its decision, stating, "physical impossibility is but one ground for preemption..."[37] and "[s]ince inconsistent state regulation poses an impediment to rapid development of interstate facilities, preemption is justified in this case even if 'physical impossibility' is not an issue."[38] The court below found that "the instant appeal raises no question of actual physical impossibility of complying with dual federal and state regulation, presumably, the carriers could keep accounts in which assets would be separately depreciated for intrastate and interstate purposes."[39]

The jurisdictional test adopted by the 4th Circuit in *NCUC I* unfairly places the burden of proof on the states to prove that state regulation does not have a substantial adverse effect on interstate communications. This problem

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[34] *Id.* at 210.

[35] Parts III and IV *infra*.

[36] *Id.* at 392, wherein the court stated: "Because we have determined that the affirmative regulatory action taken by the FCC suffices to preempt inconsistent state action, we find it unnecessary to decide whether, as a matter of law, the language of the Act itself requires preemption."

[37] *Id.* at 396.

[38] *Id.* at 396.

[39] *Virginia State Corp. Comn., supra* at 396.

is clearly illustrated in the case at bar from the FCC's statement: "Here the setting of depreciation rates is not an essential local incident or practice . . ."[40] The issue should not focus on the interest of the states but upon the legitimate interests of the FCC.

In light of the specific reservation of power to the states contained in the Act, the burden should be shifted and the test reformulated. The FCC should only have jurisdiction over the intrastate portion of jointly used facilities or services upon a clear showing by the FCC: (1) that it is not possible for the charges, classifications or regulation of such facilities or services to be reasonably separated between concurrent interstate and intrastate jurisdictions, and (2) that specific intrastate rates or service regulations will have a substantial, adverse effect upon interstate communications services. If specific intrastate charges, classifications or regulation of jointly used facilities or services is susceptible to concurrent regulation then the FCC should not be allowed to preempt state regulation. All of the previous cases discussed hereinabove conform with this method of review.

IV. RULEMAKING ORDERS PROMULGATED BY THE FCC ARE REQUIRED TO BE SUPPORTED BY FINDINGS OF FACT STATED IN THE ORDER.

The FCC failed to clearly state a factual basis for its decision in the Preemption Order and the court below erred in failing to review the factual basis of the FCC's decision. The FCC is required to clearly state their findings of fact in their rulemaking orders pursuant to Section 553 of the Administrative Procedures Act.[41] Judicial construction

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[40] *Preemption Order, supra* at 875, ¶ 30.

[41] 5 U.S.C. §500 *et seq.*

imposes fact finding requirements that go well beyond the minimal requirements contained in Section 553.[42]

The judicial trend toward more stringent requirements for findings of fact in federal agency proceedings began with the decision in *Automotive Parts & Accessories Assn., Inc. v. Boyd.*[43] In that case, the court found that Section 553 required federal agencies to make findings which would "enable [the court] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did . . . ."[44]

The requirements of Section 553 were also at issue in *Kennecott Copper Corp. v. EPA.*[45] In that case, the court remanded the adoption of a new EPA guideline because there was an insufficient foundation upon which to base the new standard. The court noted that "there are contexts . . . in which the minimum requirements of the Administrative Procedure Act may not be sufficient."[46] More specifically, in *Portland Cement Assn. v. Ruckelshaus*[47] the court noted, "it is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that to a critical degree is known only to the agency."[48]

Further guidance can be drawn from *P.A.M. News Corp. v. Hardin*[49] in which the court noted, "administrative agencies must give reasoned consideration to all the material facts and issues presented to them in the rule-making

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[42]Kenneth Culp Davis, 1 *Administrative Law Treatise* §6:1 *et seq.* (1978).

[43]407 F.2d 330 (D.C. Cir. 1968).

[44]*Id.* at 338.

[45]462 F.2d 846 (D.C. Cir. 1972).

[46]*Id.* at 850.

[47]486 F.2d 375 (D.C. Cir. 1973).

[48]*Id.* at 395.

[49]440 F.2d 255 (D.C. Cir. 1971).

proceeding and must articulate with reasonable clarity their reasons for decision."[50]

Perhaps the best summary of the requirements for findings of facts can be found in *General Tel. Co. of the Southwest v. U.S.*[51] in which the court stated:

> It is clear that the findings required of an agency in its rule-making capacity are of a different nature from those required in adjudication . . . it is not expected that the agency will discuss in detail every item of fact or opinion included in the comments submitted to it. However, it is expected, if judicial review is to serve its purpose, that the agency's concise general statement mandated by Section 553 will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.[52]

Therefore, the *amici* submit that the Preemption Order is deficient in failing to provide a factual basis for the decision and the court below committed reversible error in failing to require the Commission to do so.

V. THE FCC DOES NOT HAVE GENERAL INTRASTATE RATEMAKING AUTHORITY.

The FCC presented an array of reasons supporting its preemption of state regulation, but it applied its reasoning to the full spectrum of intrastate regulation without identifying any particular charges or service regulations which substantially affect interstate communications. The depreciation expense and depreciation reserve components included in the calculation of the intrastate revenue requirement cannot cause any effect on interstate com-

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[50] *Id.* at 258.

[51] 449 F.2d 846 (5th Cir. 1971).

[52] *Id.* at 862.

munications. Only rates and service regulations can affect interstate communications.

The FCC presented in the Preemption Order the following reasons as grounds for its action: 1) To accelerate the implementation of new technology; 2) To provide for more timely capital recovery; 3) To facilitate the raising of additional investment capital; 4) To make intrastate rates reflect cost based pricing; 5) To facilitate the deregulation of CPE; and 6) To eliminate inequities of shifting usage patterns. The FCC did not state that it is concerned with the quality of existing facilities, the replacement rate for existing facilities, or the rate at which innovations are being developed. The FCC has only implied that the overall level of earnings from intrastate services are inadequate, and that intrastate rates do not adequately reflect the underlying costs of providing some unidentified services.

In support of the FCC's desire to accelerate modernization, the FCC merely stated the conclusion that equal life group and remaining life depreciation, "more closely approximate straight line depreciation"[53] and that, "[m]ore timely capital recovery results in faster technological innovation . . . ."[54] The FCC does not, however, explain how these two depreciation practices result in faster technological innovation. It is well known that a utility plant can be replaced at any time regardless of its net book value or depreciation accounting practices.[55]

In relation to the need to raise additional investment capital, the FCC insinuates that without its two depreciation methods, investors will be sent "improper signals"[56]

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[53] *Id.* at 876, ¶ 35.

[54] *Id.*

[55] California brief, Part C2, p. 54.

[56] *Preemption Order*, at 877, ¶ 37.

and "could well impair their [the companies'] ability to raise the investment they need to fully compete . . . ."[57] Unless an investor assumes that the company will not recover an abandonment loss upon the replacement of equipment, an investor would not be very concerned with the accounting procedure under which the loss will be recovered.

The primary basis for the FCC's arguments clearly appear to be a perceived inadequacy of the level of intrastate earnings and an inadequacy of the general intrastate rate design. The FCC wants to increase retained earnings for capital construction and to increase returns on common equity in order to attract investors.

The FCC also appears to want intrastate rates to strictly reflect costs, but the FCC does not argue in its order that its actions require cost based pricing. Telephone rates can be priced in many different ways based on a variety of cost support data.

The Fourth Circuit committed reversible error and the Preemption Order should be reversed on the grounds that the adequacy of overall intrastate revenue requirements, the overall rate of return from intrastate operations, and the intrastate cost of service methods are factually outside of the jurisdiction of the FCC. The FCC must be required to identify a specific intrastate charge or service regulation which substantially affects interstate communications, or Section 152(b) will be rendered meaningless.

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[57] *Id.*

Respectfully submitted on this the 9th day of September, 1985.

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